Bun Fui Min & Anor v Seliang ak Tuah

HIGH COURT (SIBU) — CIVIL APPEAL NO 12–4 OF 2009
RAVINTHRAN JC
28 SEPTEMBER 2009

Civil Procedure — Appeal — Notice of — Whether delay of ten days in serving notice of appeal on respondent fatal — Whether failure to serve notice on respondent within prescribed time limit caused any substantial miscarriage of justice — Whether appeal defective because third and fourth defendants not notified

On 9 January 2003, Seliang ak Tuah ('plaintiff'), who was riding a motorcycle, was injured in a motor vehicle accident involving a car driven by the first defendant and a lorry driven by the third defendant. The second and fourth defendants were the respective registered owners of the vehicles in question. The plaintiff who suffered serious head and other injuries commenced an action against the drivers of the car and lorry and their respective owners. On 7 November 2008, the sessions court judge found the first defendant 100% liable for the collision and awarded the plaintiff RM1,018,494 for special and general damages. The claims against the driver and owner of the lorry, the third and fourth defendants, were dismissed. The first defendant driver and the second defendant owner of the car ('appellants') appealed against that decision. Although the notice of appeal was filed within the prescribed 14 days time limit on 18 November 2008, the notice of appeal was only served on the plaintiff on 1 December 2008, ie ten days late. In January 2009 the appellants applied for an extension of time to serve the notice of appeal but they only asked for a four day extension ie until 25 November 2008 to serve the notice of appeal on the plaintiff. The court granted the appellants an order in terms. At the hearing of the appeal the plaintiff/respondent ('respondent') raised a preliminary objection questioning the competency of the appeal. The respondent claimed that there was a breach of O 48 r 2(3) of the Subordinate Courts Rules 1980, in that, the notice of appeal was served out of time. The respondent also argued that the order granting an extension of time did not regularise the delay in serving the notice of appeal on the respondent because the order required the notice of appeal to be served on or before 25 November 2008, which was not complied with. The appellants urged the court to invoke O 1A and O 2(3) of the Rules of the High Court 1980 ('RHC') to overlook the delay on the grounds that it did not cause any substantial miscarriage of justice. The respondent further submitted that the appellants' appeal was defective because

the third and fourth defendants, being parties directly affected by the appellants' appeal had not been notified of this appeal.

Held, dismissing the appeal with costs:

(1) The Federal Court ruled that the phrase 'technical non-compliance' meant non-compliance with a rule which was not fundamental or mandatory in nature. In the instant case, the requirement to serve the notice of appeal on the respondent within the prescribed time was mandatory in that, without the filing and service of the notice of appeal within the prescribed time, there was no appeal in existence. Further, there was an intentional disregard of the court rules in this case in that the four day extension applied for and obtained by the appellants never regularised the late service of the notice of appeal, which was still out of time by six days. In addition, the appellants did not file any application for a proper extension of time before this appeal was heard. As such the appellants should not be allowed to invoke O 1A of the RHC to regularise their failure to observe the rules and this appeal ought to be dismissed on that ground alone (see para 6).

(2) In the notice of appeal the appellants stated their appeal was against the entire decision of the sessions court and this must be taken to mean that the appeal was also against the SCJ's decision to exonerate the third and fourth defendants from any blame in the accident. Given that the appellants apart from claiming contributory negligence against the respondent had also blamed the third defendant lorry driver for the collision in which the respondent was badly injured there was no reason not to consider the third and fourth defendants as parties who were directly affected by this appeal. However, the appellants had failed to join the third and fourth defendants in this by appeal by serving them with the notice of appeal. Thus, if the court was minded to allow the appeal and apportion liability either wholly or partially against the third and fourth defendants, it would not be able to make the appropriate orders because the latter were not parties to this appeal. As such, the appellants' appeal was defective in that the parties directly affected by the appeal had not been notified (see paras 7–8).

[Bahasa Malaysia summary

Pada 9 Januari 2003, Seliang ak Tuah ('plaintif'), yang menunggang motosikal, telah cedera di dalam kemalangan motokar melibatkan kereta yang dipandu oleh defendan pertama dan lori yang dipandu oleh defendan ketiga. Defendan kedua dan keempat masing-masing merupakan pemilik-pemilik berdaftar kenderaan yang dipersoalkan. Plaintif yang mengalami kecederaan kepala yang serius dan kecederaan-kecederaan memulakan tindakan terhadap pemandu-pemandu kereta dan lori dan pemilik-pemilik berdaftarnya. Pada 7

November 2008, hakim mahkamah sesyen memutuskan defendan pertama 100% bertanggungan bagi pelanggaran dan mengawardkan plaintif RM1,018,494 bagi ganti rugi am dan khas. Tuntutan terhadap pemandu dan pemilik lori, defendan ketiga dan keempat, ditolak. Pemandu, defendan pertama dan pemilik kereta, defendan kedua ('perayu-perayu') merayu terhadap keputusan tersebut. Walaupun notis rayuan telah difailkan dalam had masa 14 hari yang ditetapkan pada 18 November 2008, notis rayuan diserahkan kepada plaintif pada 1 Disember 2008 iaitu sepuluh hari lewat. Pada Januari 2009, perayu memohon bagi perlanjutan masa untuk menyampaikan notis rayuan tetapi mahkamah hanya membenarkan perlanjutan selama empat hari sehingga 25 November 2008 untuk menyampaikan notis rayuan kepada plaintif. Mahkamah memberikan perayu-perayu perintah seperti yang dipohon. Dalam perbicaraan rayuan, plaintif/responden ('responden') telah menimbulkan satu bantahan awal mempersoalkan kekompetenan rayuan. Responden mendakwa bahawa terdapat pelanggaran A 48 k 2(3) Kaedah-Kaedah Mahkamah Rendah 1980, di mana, notis rayuan diserahkan luar had masa. Responden juga menghujahkan bahawa perintah membenarkan perlanjutan masa tidak menlaraskan kelewatan dalam menyampaikan notis rayuan kepada responden kerana perintah menetapkan bahawa notis rayuan diserahkan pada atau sebelum 25 November 2008, yang mana tidak dipatuhi. Perayu-perayu memohon kepada mahkamah untuk memakai A 1A dan k 2(3) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') untuk tidak mengambil perhatian pada alasan-alasan kelewatan kerana tidak menyebabkan salah laksana keadilan. Responden selanjutnya menghujahkan bahawa rayuan perayu-perayu adalah cacat kerana defendan ketiga dan keempat, sebagai pihak-pihak yang terlibat secara langsung dalam rayuan perayu-perayu tidak dimaklumkan mengenai rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah Persekutuan telah memutuskan bahasa frasa 'ketidakpatuhan teknikal' bermaksud ketidakpatuhan kaedah yang bukan asas atau mandatori sifatnya. Di dalam kes ini, keperluan untuk menyampaikan notis rayuan kepada responden dalam had masa yang ditetapkan adalah mandatori di mana, tanpa pemfailan dan penyampaian notis rayuan dalam had masa, tidak wujud rayuan. Selanjutnya, terdapat pengabaian kaedah mahkamah secara sengaja di dalam kes ini di mana lanjutan empat hari yang dipohon dan diperolehi oleh perayu-perayu tidak menlaraskan kelewatan penyampaian notis rayuan, yang mana telah melebihi had masa selama enam hari. Tambahan pula, perayu-perayu tidak memfailkan sebarang permohonan wajar bagi perlanjutan masa sebelum rayuan ini. Dengan itu, perayu-perayu tidak sewajarnya dibenarkan untuk menggunakan

A 1A KMT untuk melaraskan kegagalan mereka mematuhi kaedah-kaedah dan rayuan ini sewajarnya ditolak atas alasan tersebut (lihat perenggan 6).

(2) Dalam notis rayuan ini, perayu-perayu menyatakan bahawa rayuan mereka adalah terhadap keseluruhan keputusan mahkamah sesyen dan ini mestilah dimaksudkan bahawa rayuan ini juga adalah terhadap keputusan hakim mahkamah sesyen yang membebaskan defendan ketiga dan keempat daripada sebarang tuduhan di dalam kemalangan. Memandangkan perayu-perayu, selain daripada mendakwa responden bagi kecuaian bersama, juga telah mendakwa defendan ketiga iaitu pemandu lori bagi pelanggaran yang mana responden telah mengalami kecederaan serius, tiada alasan untuk tidak memasukkan defendan ketiga dan keempat sebagai pihak-pihak yang terjejas dalam rayuan ini. Walau bagaimanapun, perayu-perayu gagal untuk memasukkan defendan ketiga dan keempat di dalam rayuan ini dengan tidak menyerahkan notis rayuan kepada mereka. Dengan itu, sekiranya mahkamah berkehendak membenarkan rayuan dan membahagikan tanggungan/liabiliti secara sepenuhnya atau sebahagian terhadap defendan ketiga dan keempat, ia tidak boleh membenarkan perintah yang sepatutnya kerana mereka bukan pihak-pihak kepada rayuan ini. Oleh itu, rayuan perayu adalah cacat di mana pihak-pihak yang terjejas secara langsung tidak dimaklumkan (lihat perenggan 7–8).]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1268–1347.

Cases referred to

Alom Industries Sdn Bhd v Wong Hoang Chiong [2006] 5 CLJ 1, HC (refd)

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134; [2002] 3 CLJ 686, HC (refd)

BI Credit & Leasing Berhad (dahulunya dikenali sebagai Kewangan Industri Berhad) v Loo Wah Hee & Anor [2002] MLJU 302; [2002] 1 LNS 114, HC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-haj v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 1 MLJ 625; [2009] 4 CLJ 329, FC (refd)

Galland Enterprise Sdn Bhd & Ors v Supermix Concrete (East Malaysia) Sdn Bhd [2006] 5 MLJ 805; [2005] 8 CLJ 127, HC (refd)

Haji Khalid bin Abdullah, Re; Ex p Danaharta Urus Sdn Bhd [2007] MLJU 456; [2008] 2 CLJ 326, HC (refd)

Ipmuda Utara Sdn Bhd v Westech Sdn Bhd [2002] MLJU 77; [2002] 6 CLJ 285, HC (refd)

A *MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd* [2004] MLJU 24; [2004] 1 CLJ 661, HC (refd)

Sarawak Electricity Supply Corporation & Others v Kwan Choon Kiong [2003] MLJU 310, HC (refd)

B *Syarikat Amin Enterprises v Edwina Lau* [2007] MLJU 314; [2007] 10 CLJ 743, HC (refd)

Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor [1990] 1 MLJ 208, HC (refd)

Tan Yiew Kim (berniaga sebagai (Caltex) Service Station) v Caltex Oil Malaysia
C *Limited* [2008] MLJU 224; [2008] 1 LNS 46, HC (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561; [2001] 2 CLJ 31, CA (refd)

Winwin Consult Sdn Bhd v Lee Ming Press Company [2007] MLJU 660; [2007] 1 LNS 534, HC (refd)

D

Legislation referred to

Rules of the High Court 1980 O 1A, O 2(3), O 6 r 7(2A), O 49 r 6
Subordinate Courts Rules 1980 O 48 r 2(3)

E *Andy Tan (David Allan Sagah & Teng Advocates) for the appellants.*
Sarbjit Singh (Khaira & Co) for the respondent.

Ravinthran JC:

F RULING

[1] This is an appeal from the decision of the sessions court judge who found the appellants wholly liable for the injuries that the respondent sustained in a
G motor collision. The brief facts are as follows. The respondent was riding a motorcycle on 9 January 2003. He had stopped in the middle of the road waiting for oncoming vehicles to pass before turning to the right. The other vehicles around him at that time were the appellant ('the first defendant') who was driving a car behind him and the third defendant who driving a lorry from
H the opposite direction. The second and fourth defendants are the respective registered owners of the vehicles in question. The respondent was severely injured in the collision. He suffered serious head and other injuries. He is now wheelchair bound with permanent brain impairment and he requires full nursing care. He sued the drivers of the car and the lorry. The sessions court
I judge found the driver of the car (the first appellant herein) 100% liable for the collision. He dismissed the claim against the driver of the lorry and the owner. The judgment that he awarded in favour of the respondent is in the sum of RM1,018,494 in special and general damages which includes loss of income and costs of nursing care.

PRELIMINARY OBJECTIONS IN RESPECT OF THE COMPETENCY OF THE APPEAL

Delay in serving the notice of appeal

[2] The judgment was delivered on 7 November 2008. The notice of appeal was filed within the prescribed 14 days time limit on 18 November 2008. However the notice of appeal was only served on the respondent solicitors on 1 December 2008, ie ten days late. Order 48 r 2(3) of the Subordinate Courts Rules 1980 stipulates that the notice of appeal must be filed in court and served on the respondent within 14 days. The appellant solicitors proceeded to file the record of appeal and memorandum of appeal. However in January 2009, they filed an application in the sessions court to extend time to serve the notice of appeal. For some reasons that are not clear, they only asked for an extension to serve the notice of appeal until 25 November 2008 or to extend time by four days or such other period as the court may deem fit. The court granted order in terms. Counsel for the respondent has argued that the order has not been perfected and even if it was, the extension could only be until 25 November 2008 as the court did not make any other order. Before me, counsel for the appellants has not disputed the delay. However it is obvious that the extension he sought from the sessions court did not regularise the delay in serving the notice of appeal on the respondent. Counsel for the appellants has urged the court to invoke O 1A and O 2(3) of the Rules of the High Court 1980 to overlook the delay on the ground that it did not cause any substantial miscarriage of justice. Counsel for the appellants did not cite any authorities directly in point that regularised an appeal that was served out of time since the coming into force of the above provisions. However, learned counsel for the appellants submitted that the new approach by the courts is that delay can be condoned as long as no substantial miscarriage of justice is occasioned. He cited the cases of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561; [2001] 2 CLJ 31; *Alom Industries Sdn Bhd v Wong Hoang Chiong* [2006] 5 CLJ 1; *Syarikat Amin Enterprises v Edwina Lau* [2007] MLJU 314; [2007] 10 CLJ 743; *Winwin Consult Sdn Bhd v Lee Ming Press Company* [2007] MLJU 660; [2007] 1 LNS 534; and *Re Haji Khalid bin Abdullah; Ex p Danaharta Urus Sdn Bhd* [2007] MLJU 456; [2008] 2 CLJ 326. Counsel for the respondent on the other hand submitted that the appeal is not properly before the court because of the delay. In support he cited *Ipmuda Utara Sdn Bhd v Westech Sdn Bhd* [2002] MLJU 77; [2002] 6 CLJ 285 and *Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor* [1990] 1 MLJ 208. In *Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor*, the appellant was late by a day or two in serving the notice of appeal on the respondent. However, the Singapore High Court held that:

> … before there could be in existence an appeal, the notice of appeal must be both filed and served within the prescribed time.

[3] In the local High Court case of *Ipmuda Utara Sdn Bhd v Westech Sdn Bhd* [2002] MLJU 77; [2002] 6 CLJ 285, James Foong J (as he then was) held that the delay in serving a notice of appeal to the respondent is fatal. As counsel for appellant pointed out, this decision was made before the coming into force of O 1A of the Rules of the High Court 1980.

EFFECT OF O 1A

[4] O 1A reads as follows:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[5] The purpose of the amendment is 'to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections' (per Low Hop Bing J in *Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan* [2002] 6 MLJ 134; [2002] 3 CLJ 686 at p 692 e–g). Since this provision was inserted in May of 2002, it had been the subject of discussion in a number of reported cases where its aid had been invoked to regularise various breaches of court rules (see *Tan Yiew Kim (berniaga sebagai (Caltex) Service Station) v Caltex Oil Malaysia Limited* [2008] MLJU 224; [2008] 1 LNS 46; *BI Credit & Leasing Berhad (dahulunya dikenali sebagai Kewangan Industri Berhad) v Loo Wah Hee & Anor* [2002] MLJU 302; [2002] 1 LNS 114; and *MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd* [2004] MLJU 24; [2004] 1 CLJ 661). In *Tan Yiew Kim (berniaga sebagai (Caltex) Service Station) v Caltex Oil Malaysia Limited* a late affidavit that was objected to by the opposing side was disallowed although O 1A was invoked. In *BI Credit & Leasing Berhad (dahulunya dikenali sebagai Kewangan Industri Berhad) v Loo Wah Hee & Anor*, an objection to the form of jurat was overruled under O 1A. In *MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd* the failure to state the amount of the liquidated claim and the failure to state that the defendant could pay the debt within 20 days in the writ of summons was held to be fatal although the plaintiff attempted to rely on O 1A. Learned counsel for the accused submitted the case of *Galland Enterprise Sdn Bhd & Ors v Supermix Concrete (East Malaysia) Sdn Bhd* [2006] 5 MLJ 805; [2005] 8 CLJ 127 where the issue that arose was whether the mode of service of the notice of appeal was proper. The court overlooked the failure to serve the notice of appeal properly because the respondent had acknowledged the record of appeal and was therefore deemed to know that there was an appeal pending. In the case of *Sarawak Electricity Supply Corporation & Others v Kwan Choon Kiong* [2003] MLJU 310 that was cited by counsel for the respondent, the court held that a delay of three days in serving the notice of appeal on the respondent was fatal. In the recent case of

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-haj v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 1 MLJ 625; [2009] 4 CLJ 329, Federal Court had occasion to consider the applicability of O 1A to breaches of court rules. In that case, the plaintiffs failed to comply with O 6 r 7(2A) of the Rules of the High Court before applying to renew the writ. The court held that compliance with O 6 r 7(2A) is mandatory and that O 1A cannot be invoked to supersede it when a party had intentionally disregarded it. Zaki Tun Azmi CJ said as follows in the said case:

> The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A of the RHC cannot be invoked when a party intentionally disregards in complying with the rules. Otherwise, parties would be encouraged to ignore the rules. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) of the RHC for their own reasons.

[6] The Federal Court ruled that the phrase 'technical non-compliance' is a reference to non-compliance with a rule which is not fundamental or mandatory in nature. In the instant case, the requirement to serve the notice of appeal on the respondent within the prescribed time is mandatory. In fact some of the cases cited above say that without filing and serving a notice of appeal within the prescribed time, there is no appeal in existence. I shall now consider whether there was intentional disregard of court rules in this case. It is apparent that the appellants knew they were late in serving the notice of appeal by ten days because in January of the following year, they filed an application to extend time to regularise the delay before the sessions court. However, for some inexplicable reason, instead of seeking an extension of ten days or until the actual service of notice of appeal, the appellants only sought 'a four day extension or until 25 of November 2008 or until a further period that the court deems fit'. The sessions court granted order in terms which means that a four day extension or an extension until 25 November 2008 had been granted. However the solicitors for the appellants had served the notice of appeal only on 1 December 2008. Therefore the late service of the notice of appeal was never regularised as it was still out of time by six days. Even after this appeal was fixed for hearing, the appellants did not file any application to extend time to validate the late service of the notice of appeal. I find this to be an intentional disregard of the rules pertaining to service of the notice of appeal. Counsel for the appellants submitted that the delay was an oversight and that was why the sessions court judge granted an extension. Even if I accept that there was an oversight at the beginning, it still does not explain the conduct of the appellants in not applying for a proper extension of time before this appeal was heard. In the premises, the appellants should not be allowed to invoke the aid of O 1A to regularise their failure to observe the rules. On this ground alone I dismiss the

appeal of the appellants.

WHETHER THE THIRD AND FOURTH DEFENDANTS SHOULD HAVE BEEN SERVED?

[7] The respondent in this case sued both the car driver and its registered owner as well as the lorry driver (third defendant) and its registered owner (fourth defendant). During the submission stage in the lower court, the appellants attempted to pin liability on the third defendant. However, the sessions court judge found the first appellant wholly liable for the collision. Consequently, he dismissed the claim against the third and fourth defendants. The notice of appeal filed by the appellant states that the appeal is against entire decision of the sessions court judge. This must be taken to mean the appeal is also against the decision to exonerate the third and fourth defendants from any blame in the accident. Furthermore in the memorandum of appeal, the appellants again blamed the third defendant for the collision in which the respondent was badly injured. All these simply means, that in the event the appeal is heard on the merits, the appellate court would be persuaded to either wholly or partially shift liability to the third and fourth defendants. However, if the court is minded to allow the appeal and apportion liability either wholly or partially against the third and fourth defendants, the court would not be able to make the appropriate orders because the appellant failed to join the third and fourth defendants in this appeal by serving them with the notice of appeal. Order 49 r 6 provides as follows:

> (6) The notice of appeal shall be served by the appellant within the time limited for the filing of appeal *on all parties directly affected by the appeal* or their respective solicitors. It shall not be necessary to serve parties not so affected. (Emphasis added.)

[8] Given the fact that the appellants, apart from claiming contributory negligence against the respondent, had also blamed the third defendant for causing the collision, there is no reason not to consider the said third and fourth defendants as parties who are directly affected by the appeal. Therefore, as learned counsel for the respondent submitted, the appellants' appeal is defective in that the parties directly affected by the appeal had not been notified. If the third and fouth defendants had been notified and they chose not appear at the appeal hearing, the court could make an appropriate order against them in the event the appeal is allowed. Otherwise, any potential order against the third and fourth defendants would offend the principle of natural justice as they had not been given any opportunity to be heard. In the premises, the second preliminary objection of the respondent succeeds as well.

[9] For the above reasons, the appeal is hereby dismissed with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan